CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 5

THE CITY OF WACO, TEXAS, PETITIONER,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRUCIT

PETITION FOR CERTIORARI FILED MARCH 22, 1934

CERTIORARI GRANTED APRIL 30, 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 5

THE CITY OF WACO, TEXAS, PETITIONER,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRUCIT

INDEX

	Original	Print
Proceedings in United States circuit court of appeals, fifth circuit	a	1
Caption (omitted in printing)	a	
Record from district court of the United States, Western Texas	1	1
Caption (omitted in printing)	1	
Record from district court of McLennan County	2	1
Caption (omitted in printing)	3	
Plaintiff's original petition	3	1
Citation to City of Waco and sheriff's return	13	8
Citation to Combs & Glade and sheriff's return	16	10
Answer and cross-action of defendant City of Waco	18	12
Citation and cross-action of defendant City of Waco	20	13
Original answer of Combs & Glade	23	15
Notice to City of Waco of petition for removal	25	16
Notice to Curtis Boggs of petition for removal	26	17
Notice to Combs and Glade of petition for removal	28	18
Petition for removal	29	19
Contest of petition for removal	33	21
Bond for removal (omitted in printing)	37	
Bill of costs (" " ")	40	
Clerk's certificate (" " ")	40	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 29, 1934

—5050-C

	Original	Print
Original answer of defendant, United States Fidelity & Guaranty Company	41	24
Motion to remand to State court	42	25
Order overruling motion to remand and dismissing as to United States Fidelity & Guaranty Company and remanding cause to State court	45	26
Petition for appeal	47	28
Order allowing appeal and fixing amount of bond	48	29
Waiver of issuance and service of citation and notice of appeal	48	29
Appeal bond (omitted in printing)	50	
Assignment of errors	54	30
Praecipe for transcript with waiver	56	32
Clerk's certificate (omitted in printing)	58	
Minute entry of argument and submission (omitted in printing)	59	
Opinion, Hutcheson, J	60	33
Judgment	64	36
Petition of appellant for rehearing (omitted in printing)	65	
Petition of appellee for rehearing (omitted in printing)	72	
Order denying petitions for rehearing	77	36
Clerk's certificate (omitted in printing)	78	
Order allowing certiorari	79	37

[fols. 1-2 & a-2] [Caption omitted]

[fol. 3]

IN THE 74TH JUDICIAL DISTRICT COURT OF McLENNAN COUNTY, TEXAS

No. 12509

CURTIS BOGGS

vs.

COMBS & GLADE et al.

PLAINTIFF'S ORIGINAL PETITION—Filed April 7, 1932

To the Honorable Giles P. Lester, judge of said Court:

Your petitioner, Curtis Boggs, a resident citizen of McLennan County, Texas, hereinafter styled plaintiff, complains of J. W. Combs and William P. Glade, each resident citizens of Wichita County, Texas, doing business as Combs and Glade, and the City of Waco, in McLennan County, Texas, which City is a municipal corporation duly incor- [fol. 4] porated under the laws of Texas, and operating as a Home Rule City under the Home Rule Amendment to the Constitution, hereinafter styled defendants, and for cause of action plaintiff respectfully shows to the Court as follows:

1

That under the Charter of the City of Waco, the governing body of said City has the exclusive control and power over the streets and to abet- and remove obstructions therefrom and thereof; to grade, pave or otherwise improve the same; to prevent the encumbering of the same in any manner whatsoever; to compel all persons to keep all rubbish of any kind from the streets and gutters in front of the premises owned or occupied by them; to regulate or alter the grade of such streets, and to construct and keep in repair all crossings, and to regulate the use of same.

2

That in accordance with such authority, the defendant, the City of Waco, passed Articles 40 and 41 of it's criminal code, as follows:

Article 40. It shall not be lawful for any person to make or cause to be made any excavation in any street, alley, sidewalk, gutter or commons in the City of Waco, without first obtaining authority to do so as provided for in the Civil Ordinances of the City of Waco.

Article 41. Any person having authority as provided by Ordinance to make or cause to be made any such excavation as is mentioned in the preceding Article, or who shall act without such authority, and who has made, or caused to be made, such excavation, who shall leave or permit such [fol. 5] excavation to be left in such manner as to endanger travel along said street, alley, sidewalk, gutter or commons, or who shall keep or permit such excavation to be kept in such a condition as is reasonably calculated to interfere with or inconvenience travel along such street, alley, sidewalk, gutter or commons for any greater length of time than is reasonably necessary, or who shall fail when refilling said excavation to thoroughly pack the same or cause it to be done, or who shall fail to put said street, alley, sidewalk, gutter or commons back intact at the place where such excavation is made, and in as near the condition that the same was before such excavation was made as practicable, or cause the same to be so done, or who shall fail within two days after notice, either written or verbal, from the City Engineer, either before or after prosecution under any other clause of this Ordinance, to make any necessary repairs at the place where such excavation was made, which repair is made necessary by reason of such excavation having been so made, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than $5.00 nor more than $200.00.

3

Plaintiff further shows to the Court that heretofore, to-wit: on November 19, 1929, the defendant, City of Waco, submitted bids for the paving of Maple Avenue from the West property line of North 15th Street to the West prop-

erty line of North 28th Street in said City, and the paving thereof was awarded by said City to the defendants Combs and Glade, and thereafter on December 3, 1929, the defendants herein entered into contract, made part of a City ordi- [fol. 6] nance of the City of Waco, whereby the plans and specifications used in said bidding became part of said contract and said ordinance, and under the terms of which the defendants, Combs and Glade contracted and bound themselves under penalty to bring to proper grade the adjacent, abutting streets and alleys so that grades of abutting streets and alleys would conform to the new grade of the improvement on Maple Avenue, and to shape up said intersecting streets far enough back from the new work to avoid an abrupt drop or run off, and the ordinances and laws of the City of Waco were made part of said contract, as well as all laws of the County and State, ordinances and regulations controlling the action or operation of those engaged upon the work or affecting the materials used, and govern themselves in accordance with them; and the said contract further provided that all excavated material or other material in the street claimed by the City of Waco should be the property of the said City and should be disposed of as instructed by the engineer of the City of Waco, maximum length of free haul not to exceed 1500 feet, and that if the City did not want any part of excavated materials, same should become the property of the defendants Combs and Glade and should be immediately removed from the street; and the defendant, City of Waco, did not claim the pile of dirt and rock hereinafter complained of, whereby it had become the duty of the defendants Combs and Glade to remove the same immediately after it had been piled up; and the said contract further provided that the defendants, Combs and Glade, should do all work that was necessary to connect the new paving work with adjoining street and alley intersections, or at any other place along the line of [fol. 7] the improvement, in a proper and workmanlike manner; and the defendants, Combs and Glade further bound and obligated themselves to erect and maintain at all points open to public travel sufficient guards and fences and maintain red lights at night from sunset to sunrise to prevent accidents to persons and property.

4

And plaintiff shows to the Court that it was a violation of a criminal ordinance of the City of Waco for the defendants, Combs and Glade, to do the said work in the said street, except with a permit, and the permit in this instance contained the provisions, conditions and stipulations as set out in the last preceding paragraph of this petition, and any other manner or methods except as set out in said contract was unlawful and negligence per se on the part of said defendants.

5

Plaintiff shows to the Court that the defendants, Combs and Glade, wholly failed to perform their work in a careful manner, as they had agreed and obligated themselves to do, and wholly failed to shape up the streets and alleys far enough back from the new work to avoid an abrupt drop or run off; and wholly failed to remove the excess excavated dirt and rock out of the streets, as it had agreed to do, and in this connection plaintiff shows to the Court that North Eighteenth Street in the City of Waco intersects Maple Avenue where the said defendants had contracted to pave, and more than a month after the defendants, Combs and Glade had excavated Maple Avenue at the intersection with [fol. 8] North Eighteenth Street, said defendants failed and refused to shape up such intersection in such manner as to avoid an abrupt drop or run off, and failed to connect up Maple Avenue and North Eighteenth Street in a workmanlike manner, but on the other hand, said defendants left an abrupt drop or run off on the North or Northeast boundary line of Maple Avenue in North Eighteenth Street, said drop or run off being about eight inches high, and being dangerous to travel and a menace to the lives, limbs and property of the public traveling on said streets; that the said defendants also left a pile of rocks and dirt in North Eighteenth Street near the line of Maple Avenue, and failed to erect guards or rails, or to furnish any kind of protection against the same for the traveling public.

6

And plaintiff shows to the Court that the City of Waco was negligent in that it, acting through its proper officials, accepted the said work as negligently performed by the de-

fendants, Combs and Glade, and announced to the public by a public ordinance that the said street had been paved and all of the conditions of said contract had been complied with, and thereby held out to the public that the said intersecting streets had been graded down so as to prevent abrupt drops or run offs, and that all excavated materials had been removed, and that therefore said Maple Avenue and intersecting streets were safe for travel, and the City of Waco on June 17, 1930, while said streets were in said dangerous and unfinished condition, accepted the same, and waived the performance of said contract in the particulars [fol. 9] above set out, and invited the public to go over the same, and failed to remove said dangerous pile of rock and dirt or to cut down North Eighteenth Street so as to prevent an abrupt drop or run off, and failed to erect guards or rails to warn the public against said dangerous trap that had been left, all of which acts of negligence were the direct and proximate cause of plaintiff's injuries as herein set forth.

7

Plaintiff shows to the Court that the defendants, Combs and Glade, in tendering said streets to the City on June 17, 1930, represented that the work had been done in all things as provided by said contract, said representations having been made publicly in an open meeting of the City Commission of the City of Waco, and the said defendants knew at that time said streets had been left in an unfinished condition, and that a dangerous trap had been left in North Eighteenth Street in that an abrupt drop or run off eight inches high had been left therein and also a dangerous pile of rock, with no guards, and all of the said acts of negligence on the part of said defendants, Combs and Glade, as herein set out, were the direct and proximate cause of the injuries to plaintiff as herein set out.

8

Plaintiff shows to the Court that on the day of June 21, 1930, four days after the defendants Combs and Glade had represented that they completed said work in accordance with said contract, and four days after the City of Waco had accepted said work and publicly announced that it had [fol. 10] been performed in accordance with said contract, this plaintiff was driving his car West on Maple Avenue,

and as he approached North Eighteenth Street, believing said street to be safe, he turned his car into North Eighteenth Street, and it struck said dangerous embankment that had been left by the defendants, Combs and Glade, and accepted and permitted to remain there by the City of Waco, and this embankment caused his car to swerve to the left and into and upon said dangerous pile of rocks and dirt that had been left in North Eighteenth Street, and caused his car to turn over, falling on this plaintiff, and inflicting the injuries to this plaintiff and his car, as herein set out.

9

Plaintiff shows to the Court that he was shattered and bruised all over by the said car falling on him and pinning his left arm under the car, cutting plaintiff in many places and causing him a shock of his whole system; that plaintiff's left forearm was so torn that the flesh, nerves and blood vessels were torn completely away from the bone; that there was a lacerated wound across the volar surface of the left forearm, about the junction of its middle and lower thirds, which wound extended down to the bone, and there was a cut through the interosseous membrane; all of the structures of the front of the arm were severed, including both of the large arteries, the small volar interosseous artery, both the median and radial nerves and the superficial muscles on the medial surface of the forearm; that it was necessary for plaintiff to be anesthetized, the bleeding stopped by tying off the arteries and veins, the nerves re- [fol. 11] quired to be sutured and the wound closed with drainage after using a considerable quantity of normal saline to wash it out; that it was necessary to administer to plaintiff 1500 units of tetanus anti-toxin, and to place plaintiff's arm in a plaster of paris splint, and after this was done, the wound became infected, and it had to be opened and a continuous system of irrigation employed to check the infection, all of which caused large quantities of flesh to slough off, which has not grown back and never will grow back; that plaintiff's arm stayed in this condition with but small healing going on until about November 1, 1930, or a period of more than four months, during all of which time plaintiff suffered the most acute and intense pain and mental anguish; that as a result of said injuries, there is a paralysis of the flexor muscles of the fingers,

making it impossible for plaintiff to close his fingers, causing his fingers to be drawn into the position of a claw like hand, due to the paralysis of the lumbrical muscles; that this plaintiff is unable to use his left arm and will never be able to use same; that it will be necessary in the future to have another operation on plaintiff's arm, in an attempt to bring the muscles together and suture the nerves; that plaintiff is a young man with a life expectancy of more than forty years, and was preparing to enter college, and was earning eighty dollars per month preparatory to entering college, and was saving his funds for that purpose, but as a result of plaintiff's injuries it will be impossible for him to earn sufficient funds with which to enter college, and plaintiff's college career will be cut off by reason of his inability to earn his way through college; that plaintiff would have continued to increase his earnings, but that as a result of the loss of plaintiff's left arm, he has been unable [fol. 12] to do any work of any kind, and will not be able to do any work of any kind for many months yet; that plaintiff was a young man of unusual strength, but by reason of his injuries he has suffered so much as to destroy his strength and to cause plaintiff to feel bad all the time; that plaintiff's nervous system has been completely shattered, all to plaintiff's injury and damage in the sum of $50,000.00; that plaintiff's hospital bills and doctor and medicine bills have amounted to $1,000.00, and the damage to his car was $125.00, which represented the difference between its reasonable market value immediately before and immediately after said fall, and said hospital, medical and doctor's bills represent the reasonable, usual and customary charges for the services, facilities and medicines rendered and furnished, all of which damages and injuries were suffered as the reasonable direct and proximate result of the many acts of negligence on the part of the defendants herein.

10

Plaintiff shows to the court that all of the offenses, injuries and trespasses herein related occurred in McLennan County, Texas.

11

Plaintiff shows to the Court that if the acts of negligence herein set out were not done and committed by the defend-

ants Combs and Glade, then the same were done and committed by the defendant, the City of Waco.

[fol. 13] 12

Plaintiff shows to the Court that all of the defendants were joint tort feasors, and in the alternative plaintiff says that each of the defendants was guilty of all of the acts of negligence herein alleged, and in the further alternative this plaintiff says that one of the defendants was guilty of the acts of negligence herein alleged, the particular one being unknown to this plaintiff.

Wherefore, plaintiff prays that the defendants and each of them be cited to appear and answer this petition, and upon a hearing hereof that plaintiff have judgment for his damages as herein set out, and for legal interest and costs of Court, and such other and further relief, in law and in equity, general and special, as he may be justly entitled to.

Weatherby & Rogers, Attorneys for Plaintiff.

[File endorsement omitted.]

In District Court of McLennan County

Citation to City of Waco with Sheriff's Return Thereon

The State of Texas to the Sheriff or any Constable of McLennan County, Greeting:

You are hereby commanded to summon the City of Waco, a municipal corporation, to be and appear before the Hon-[fol. 14] orable Seventy-fourth Judicial District Court of McLennan County, Texas, at the next regular term thereof to be holden at the Court House in Waco on the second Monday in April 1932, the same being the 11th day of April 1932 then and there to answer the Plaintiff's petition, filed in a suit in said Court on the 7th day of April 1932 wherein Curtis Boggs is Plaintiff and J. W. Combs and William P. Glade, doing business as Combs and Glade, and the City of Waco, a municipal corporation, are Defendants. File number of suit being No. 12509.

The nature of plaintiff's demand being as follows, to-wit:

Being a suit for damages in the sum of $50,000.00 for personal injuries, for $1,000.00 for hospital bills and doctor and medicine bills, and for $125.00 damages to plaintiff's car, all alleged to be the result of defendants' negligence, plaintiff alleging that on December 3, 1929, City of Waco entered into a contract with Combs and Glade under the terms of which Combs and Glade contracted and bound themselves to bring to proper grade the adjacent, abutting streets and alleys so that they would conform to the new grade of the improvement on Maple Avenue, and shape up said intersecting streets so as to avoid an abrupt drop or run off; that Combs and Glade failed to connect up Maple Ave. and N. 18th St. in said City of Waco, in a workmanlike manner, and left an abrupt run off or drop on the North or Northeast boundary line of Maple Ave. in N. 18th St. about 8 inches high, and also left a pile of rocks and dirt in N. 18th St. near the line of Maple Ave., and failed to erect guards or rails or furnish protection against same for the traveling public; that the City of Waco accepted said [fol. 15] work in said condition; that on June 21, 1930 after said work had been accepted, while plaintiff was driving his car West on Maple Ave., he turned his car into N. 18th St., struck said embankment left by defendants, causing his car to swerve to the left and into and upon said pile of rocks and dirt, causing his car to turn over and fall on plaintiff, inflicting serious personal injuries to plaintiff to his damages in said sum of $50,000.00; that as a result of said injuries plaintiff incurred $1,000.00 hospital, doctor and medicine bills, and that his car was damaged in the said sum of $125.00, for all of which damages plaintiff prays judgment, for costs of suit, etc., and you will deliver to said Defendant the City of Waco, a municipal corporation, in person, a true copy of this Citation.

Herein fail not, but have you before said Court, on the said first day of the next term thereof, this Writ with your return thereon showing how you have executed the same.

Given under my hand and the Seal of said Court, at office in Waco, Texas, this, the 7th day of April 1932.

R. V. McClain, Clerk District Court, McLennan County, Texas, by Reba Martin, Deputy. (Court Seal.)

Sheriff's Return

Came to hand on the 7 day of April 1932 and executed in McLennan County, Texas, by delivering to each of the within named defendants, in person, a true copy of this Citation at the following times and places, to-wit:

The City of Waco, by delivering a true copy of this writ to T. F. Bush, Mayor, 4-8-32.

[fol. 16] I actually and necessarily traveled — miles in the service of this Citation, in addition to any other mileage I may have traveled in the service of other process in the same case during the same trip.

Fees: Serving — cop	$1.00
Mileage — miles	.25
Total	$1.25

Leslie Stegall, Sheriff McLennan County, Texas, by C. A. Beckham, Deputy.

In District Court of McLennan County

Citation to Combs & Glade With Sheriff's Return Thereon

The State of Texas to the Sheriff or any Constable of Wichita County, Greeting:

You are hereby commanded to summon J. W. Combs and William P. Glade, doing business as Combs and Glade to be and appear before the Honorable Seventy-fourth Judicial District Court of McLennan County, Texas, at the next regular term thereof to be holden at the Court House in Waco on the second Monday in June 1932, the same being the 13th day of June 1932 then and there to answer the Plaintiff's petition, filed in a suit in said Court on the 7th day of April 1932 wherein Curtis Boggs is Plaintiff and J. W. Combs and William P. Glade, doing business as Combs and Glade, and the City of Waco, a municipal corporation, are Defendants.

File number of suit being No. 12509.

The nature of Plaintiff's demand being as follows, to-wit: *

[fol. 17] For particulars concerning plaintiff's cause of action, see certified copy of Plaintiff's Original Petition which accompanies this citation and is made a part hereof, and you will deliver to said Defendants J. W. Combs and William P. Glade, doing business as Combs and Glade each, in person, a true copy of this Citation, together with the accompanying certified copy of the Plaintiff's Petition).

Herein fail not, but have you before said Court, on the said first day of the next term thereof, this Writ with your return thereon showing how you have executed the same.

Given under my hand and the Seal of said Court, at office in Waco, Texas, this, the 18th day of April 1932.

R. V. McClain, Clerk District Court, McLennan County, Texas, by Reba Martin, Deputy. (Court Seal.)

Sheriff's Return.

Came to hand on the 19 day of April 1932, at 8 o'clock A. M., and executed in Wichita County, Texas, by delivering to each of the within named defendants, in person, a true copy of this Citation, together with the accompanying certified copy of the plaintiff's petition) at the following times and places, to-wit:

			Mileage
J. W. Combs	4-27-1932 6 and	1713 Polk	30
Wm. P. Glade	4-27-1932 7 p. m.	Floral Hts. Cook Shop	31

doing business as Combs & Glade

I actually and necessarily traveled - - miles in the service [fol. 18] of this Citation, in addition to any other mileage I may have traveled in the service of other process in the same case during the same trip.

Fees:

Serving 2 copies	$2.00
Mileage - - miles	.60
Total	$2.60

Perry Browning, Sheriff Wichita County, Texas, by H. C. Gill and A. J. Chambers, Deputy.

In District Court of McLennan County

[Title omitted]

Original Answer & Cross-action of Defendant City of Waco—Filed May 13, 1932

Now comes the City of Waco, one of the defendants in the above numbered and entitled cause and, answering citation served upon it and pleadings filed by plaintiff herein, shows to the Court.

1

This defendant demurs generally to plaintiff's petition and says same is wholly insufficient to constitute a cause of action and of this asks judgment of the Court.

2

By way of exception, this defendant excepts to paragraph 11 of plaintiff's petition for the following reasons: [fol. 19] (a) because such statement is merely a conclusion of the pleader, as the City of Waco, being a municipal corporation, can only act through authorized agents and there are no allegations shown through what agent said City acted; (b) because it is not shown that any employee, servant, agent or representative of the City with power to bind said City committed any act; (c) because it is not shown that such act was done by any person properly authorized to commit such act.

3

Answering further, if need be, this defendant denies all and singular the allegations in plaintiff's petition contained.

4

By way of special answer and action over against the United States Fidelity & Guaranty Company, a corporation under the laws of the state of Maryland, with an office and agent in McLennan County, Texas, this defendant shows to the Court that at the time it entered into a contract with J. W. Combs and Wm. P. Glade, defendants, as alleged in plaintiff's petition, the United States Fidelity & Guaranty Company executed and delivered to this defendant its obli-

gation agreeing and binding itself to hold this defendant harmless from any claim growing out of or connected with any act of the defendants, Combs & Glade, as set out in plaintiff's petition. Therefore, said United States Fidelity & Guaranty Company is obligated and bound to this defendant to pay off and discharge any liability created by said defendants, Combs & Glade, and this defendant asks that it be made a party to this suit by being duly cited and [fol. 20] that if, upon final trial, there is any judgment against this defendant by acts of Combs & Glade, then this defendant have judgment over against United States Fidelity & Guaranty Company for a like amount.

Wherefore, this defendant asks that the plaintiff take nothing by this suit and that it go hence without day and that United States Fidelity & Guaranty Company be cited upon pleadings over against it by this defendant, and that in the event any judgment is recovered against this defendant by plaintiff in this cause, it have judgment over against the United States Fidelity & Guaranty Company.

John McGlasson, City Attorney; Geo. W. Morrow, Assistant City Attorney.

[File endorsement omitted.]

In District Court of McLennan County

Citation on Cross-action With Sheriff's Return Thereon

The State of Texas to the Sheriff or any Constable of McLennan County, Greeting:

You are hereby commanded to summon United States Fidelity & Guaranty Company to be and appear before [fol. 21] the Honorable Seventy Fourth Judicial District Court of McLennan County, Texas, at the next regular term thereof to be holden at the Court House in Waco on the second Monday in June 1932, the same being the 13th day of June 1932 then and there to answer the original answer and cross action of the defendant, City of Waco, filed in a suit in said Court on the 13th day of May 1932, in which suit Curtis Boggs is Plaintiff and J. W. Combs and William P. Glade, doing business as Combs & Glade, and

the City of Waco, a municipal corporation, are defendants, and in which cross-action the City of Waco is cross-plaintiff and the United States Fidelity & Guaranty Company is cross-defendant.

File number of suit being No. 12509.

The nature of Plaintiff's demand being as follows, to-wit:

The plaintiff Curtis Boggs sues the defendants Combs & Glade and the City of Waco for damages in the sum of $50,000.00 for personal injuries, for $1000.00 for hospital, doctors and medical bills and for $125.00 damages to plaintiff's car, all alleged to have been caused by the negligence of defendants. Plaintiff alleging that under a contract entered into between Combs & Glade and the City of Waco on the 3rd day of December, 1929, the defendants Combs & Glade paved and improved Maple Avenue in the said City of Waco, and that said Combs & Glade were negligent in paving and improving said street in that they left an abrupt drop or jump-off in said paving at the intersection of North 18th Street and Maple Avenue in said City, and plaintiff while driving his automobile over said drop or jump-off in said paving at said street intersection, his said [fol. 22] car was caused to swerve and run into a pile of rocks and dirt left at said street intersection by said Combs and Glade, causing plaintiff's damages as above set out, which accident plaintiff alleges occurred on June 21, 1930.

The Defendant City of Waco in its answer and cross-action alleges that at the time of entering into said above contract the said United States Fidelity & Guaranty Company executed to this defendant its bond or obligation obligating itself to hold this defendant harmless from any claim growing out of or connected with any act of defendants Combs & Glade in the performance of said contract. Wherefore this defendant City of Waco prays that if any judgment be rendered against it herein that it have judgment for a like amount over against the defendant United States Fidelity & Guaranty Company, and you will deliver to said Defendant United States Fidelity & Guaranty Company, in person, a true copy of this Citation.

Herein fail not, but have you before said Court, on the said first day of the next term thereof, this Writ with your return thereon showing how you have executed the same.

Given under my hand and the Seal of said Court, at office in Waco, Texas, this, the 13th day of May, 1932.

R. V. McClain, Clerk District Courts, McLennan County, Texas, by L. C. Rucker, Deputy. (Court Seal.)

Sheriff's Return

Came to hand on the 13 day of May 1932, at — o'clock —. M. and executed in McLennan County, Texas, by deliv- [fol. 23] ering to each of the within named defendants, in person, a true copy of this Citation at the following times and places, to-wit:

United States Fidelity and Guaranty Co. by delivering a true copy of this writ to Davis G. Stribling, Agent, 5-23-32.

I actually and necessarily traveled — miles in the service of this Citation, in addition to any other mileage I may have traveled in the service of other process in the same case during the same trip.

Fees: Serving 1 cop-	$1.00	
Mileage — miles		Leslie Stegall, Sheriff McLennan County, Texas, by
Total	$1.00	I. P. Stanford, Deputy.

In District Court of McLennan County

[Title omitted]

Original Answer of Defendants Combs and Glade—Filed June 7, 1932

Now comes J. W. Combs and William P. Glade, doing business as Combs & Glade, defendants in the above numbered and entitled cause, and in answer to plaintiff's petition filed herein show to the Court as follows:

[fol. 24] 1

These defendants except generally to the allegations in plaintiff's said petition contained and says the same are insufficient in law to enable plaintiff to recover as prayed for, and of this these defendants pray the judgment of the Court.

2

And further answering, if need there be, these defendants deny all and singular the allegations in plaintiff's said petition contained and demand strict proof thereof.

Wherefore having answered, these defendants pray that they go hence without day and recover all costs in this behalf incurred.

Charles I. Francis, Attorney for Defendants J. W. Combs and William P. Glade.

[File endorsement omitted.]

[fol. 25] In District Court of McLennan County

[Title omitted]

Notice to City of Waco of Petition for Removal—Filed June 8, 1932

To the City of Waco or John McGlasson, its Attorney of Record:

Please take notice that the United States Fidelity & Guaranty Company will on the 8th day of June, 1932, at 9 o'clock A. M., or as soon thereafter as counsel may be heard, move the Court for an order removing said cause to the District Court of the United States for the Western District of Texas in accordance with the petition and bond of said United States Fidelity & Guaranty Company.

This the 7th day of June, 1932.

Spell, Naman & Howell, Attorneys for United States Fidelity & Guaranty Company.

The State of Texas,
County of McLennan:

Before me, the undersigned authority, on this day personally appeared S. P. Brooks, Jr., who being by me duly sworn says that he served the above and foregoing notice on John McGlasson, attorney of record for the City of Waco, one of the defendants in the above numbered and entitled cause, by delivering a true copy thereof to the said

[fol. 26] John McGlasson on the 7th day of June, A. D. 1932, at 10:50 o'clock, A. M.

S. P. Brooks Jr.

Subscribed and sworn to before me this 7th day of June, A. D. 1932. Mae Bergstrom, Notary Public, McLennan County, Tex. (Notary Seal.)

[File endorsement omitted.]

In District Court of McLennan County

[Title omitted]

To Curtis Boggs or Weatherby and Rogers, his Attorneys
June 8, 1932

To Curtis Boggs or Weatherby and Rogers, his Attorneys of Record:

Please take notice that the United States Fidelity & Guaranty Company will on the 8th day of June, 1932, at 9 o'clock, A. M., or as soon thereafter as counsel may be heard, move the Court for an order removing said cause to the District Court of the United States for the Western District of [fol. 27] Texas in accordance with the petition and bond of said United States Fidelity & Guaranty Company.

This the 7th day of June, 1932.

Spell, Naman & Howell, Attorneys for United States Fidelity & Guaranty Company.

The State of Texas,
County of McLennan:

Before me, the undersigned authority, on this day personally appeared S. P. Brooks, Jr., who being by me duly sworn says that he served the above and foregoing notice on Weatherby & Rogers, attorneys of record for Curtis Boggs, plaintiff in the above entitled and numbered cause, by delivering a true copy thereof to G. B. Rogers of said firm of Weatherby & Rogers on the 7th day of June, A. D. 1932, at 12:30 o'clock, P. M.

S. P. Brooks Jr.

Subscribed and sworn to before me this 7th day of June, A. D. 1932. Mae Bergstrom, Notary Public, McLennan County, Texas. (Notary Seal.)

[File endorsement omitted.]

[fol. 28] In District Court of McLennan County

[Title omitted]

Notice to Combs and Glade of Petition for Removal
Filed June 8, 1932

To J. W. Combs and William P. Glade, doing business as Combs & Glade, or their Attorney of Record, Charles I. Francis:

Please take notice that the United States Fidelity & Guaranty Company will on the 8th day of June, 1932, at 9 o'clock A. M., or as soon thereafter as counsel may be heard, move the Court for an order removing said cause to the District Court of the United States for the Western District of Texas in accordance with the petition and bond of said United States Fidelity & Guaranty Company.

This the 7 day of June, 1932.

Spell, Naman & Howell, Attorneys for United States Fidelity & Guaranty Company.

I, Charles I. Francis, attorney of record for J. W. Combs and William P. Glade, doing business as Combs & Glade, defendants in the above numbered and entitled cause, hereby accept service of the above notice, this the 7th day of June, 1932.

Chas. I. Francis, Attorney of Record for J. W. Combs and William P. Glade, Doing Business as Combs & Glade.

[fol. 29] [File endorsement omitted]

IN DISTRICT COURT OF MCLENNAN COUNTY

[Title omitted]

PETITION FOR REMOVAL—Filed June 8, 1932

The petition of the defendant, United States Fidelity & Guaranty Company, a corporation, of Baltimore, Maryland, shows to the Court as follows:

1

The above entitled and numbered cause was filed in this Court by the plaintiff Curtis Boggs against J. W. Combs and William P. Glade, doing business as Combs & Glade, and the City of Waco, a municipal corporation; that thereafter, to-wit, on the 13th day of May, A. D. 1932, the said City of Waco filed its original Answer wherein the said City of Waco impleaded this defendant and made this defendant a party to said suit, and said cause is now pending in this Court against the above named parties; that the time within which this defendant is required to answer or otherwise plead has not yet expired.

[fol. 30] 2

That at the time said suit was filed and at the time said answer of the City of Waco was filed and at all times since and at the present time, your petitioner was and is a citizen of the State of Maryland, being a corporation incorporated under and by virtue of the laws of the State of Maryland and having its principal office, place of business and domicile in the City of Baltimore, State of Maryland.

That the plaintiff is a citizen and resident of the State of Texas and was a citizen and resident of the State of Texas at the time of filing of said suit and ever since and the said City of Waco is a municipal corporation incorporated under and by virtue of the laws of the State of Texas and is a citizen and resident of the State of Texas.

3

Your petitioner further respectfully represents that said suit is of a civil nature and that there is embodied therein

a controversy that is wholly between citizens of different states and that can be fully determined as between them, to-wit, between your petitioner, a citizen of the State of Maryland, as aforesaid, and the said City of Waco, who at the time of the filing of said suit and of said answer was and still is a citizen of the State of Texas, the nature of said separable controversy being as follows:

In said original petition the plaintiff Curtis Boggs sues the defendants Combs & Glade and the City of Waco in a tort action for damages in the sum of Fifty Thousand ($50,000) Dollars for personal injuries, for One Thousand ($1,000.00) Dollars for hospital, doctor and medical bills, [fol. 31] and for One Hundred Twenty-five ($125.00) Dollars damage to plaintiff's cars, all alleged to have been caused by the negligence of the defendants Combs & Glade and the City of Waco in the construction and maintenance of certain paving and improvements on Maple Avenue in the City of Waco, which improvements were alleged to have been installed or constructed under contract between Combs & Glade and the City of Waco.

In said answer the City of Waco impleads this defendant, the United States Fidelity & Guaranty Company, and alleges that at the time of entering into said contract the said United States Fidelity & Guaranty Company executed to the said City of Waco its bond or obligation, obligating itself to hold said City of Waco harmless from any claim growing out of or connected with any acts of the defendants Combs & Glade in performing said contract, which cross-action is in the nature of a suit upon a bond alleged to have been executed by this defendant.

That the controversy between the City of Waco and this defendant, the United States Fidelity & Guaranty Company, is a wholly distinct and separate cause of action from the cause of action alleged by the plaintiff as against J. W. Combs and William P. Glade, doing business as Combs & Glade, and the City of Waco, and said controversy between the City of Waco and your petitioner, the United States Fidelity & Guaranty Company, is a separable controversy which can be fully determined as between your petitioner and said City of Waco.

[fol. 32] 4

That the value of the matter in controversy in said suit and in said action by the City of Waco against your petitioner exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, as appears from the allegations of plaintiff's petition and the City of Waco's answer impleading this defendant.

5

Your petitioner presents herewith a good and sufficient bond as provided by the statute in such cases that it will enter into the District Court of the United States for the Western District of Texas, Waco Division, within thirty days from the date of filing of this petition a certified copy of the record in this suit, and that it will pay all costs which may be awarded by the said District Court in case said Court shall hold that this suit was wrongfully or improperly removed thereto.

And therefore, your petitioner prays that this Court proceed no further herein except to make an order accepting the bond presented herewith and directing that a transcript of the record herein be made for filing in the United States District Court aforesaid.

United States Fidelity & Guaranty Co., by S. P. Brooks, Jr., Attorney.

Duly sworn to by S. P. Brooks, Jr. Jurat omitted in printing.

[fol. 33] [File endorsement omitted]

IN DISTRICT COURT OF MCLENNAN COUNTY

[Title omitted]

CONTEST OF PETITION FOR REMOVAL—Filed June 9, 1932

Now comes the plaintiff in the above numbered and en-
[fol. 34] titled cause by way of answer and replication to the petition of the defendant United States Fidelity and Guaranty Company to remove this cause to the United

States District Court and plaintiff shows to the Court as follows:

1

This plaintiff excepts to the allegations in said petition contained and say that the same do not constitute sufficient grounds for removal, and of this the plaintiff prays judgment of the Court.

2

This plaintiff denies all and singular the allegations contained in said petition and demands strict proof thereof.

3

This plaintiff particularly denies that the issues as established by the pleadings in this cause contains a controversy that is wholly between citizens of different States and that can be fully determined as between them, and shows to the Court that by the pleadings on file in this cause the liability of the defendant United States Fidelity and Guaranty Company is contingent upon a recovery by this plaintiff against the City of Waco and is incidental to such recovery by plaintiff against the City of Waco and no action can be maintained at this time by the City of Waco against the United States Fidelity and Guaranty Company except as an incident to, and an adjunct to the suit of this plaintiff against the defendant, the City of Waco; that this plaintiff is a necessary party to any action by the City of Waco against the United States Fidelity and Guaranty Company [fol. 35] and the cause as established by the pleadings at this time is not separable, and therefore the United States District Court is without jurisdiction to hear and determine this cause, and this Court has full and complete jurisdiction to hear and determine same.

4

Plaintiff further shows to the Court that the defendant the City of Waco fraudulently joined the defendant the United States Fidelity and Guaranty Company for the purpose of endeavoring to oust this Court of its jurisdiction, the defendant the City of Waco well knowing that it has no cause of action against the defendant United States Fidelity and Guaranty Company for the reason that heretofore, to-wit, prior to the date of the plaintiff's injuries the City of

Waco accepted the work and workmanship of the defendant Combs & Glade, and thereby discharged the United States Fidelity and Guaranty Company from liability on its contract; that the contract entered into by the said United States Fidelity and Guaranty Company was one of indemnity only, and the act of the City of Waco in accepting the said work as being in compliance with the contract between it and the said Combs & Glade fully and finally discharged the said United States Fidelity and Guaranty Company, and the City of Waco now has no claim against them for indemnity; that the City of Waco recognized this fact in a former suit by plaintiff on this same cause of action which was originally filed in the 19th Judicial District Court of McLennan County, Texas, and from such Court transferred to the United States District Court for the Western District of Texas, at Waco, and there heard, and a non-suit [fol. 36] taken by plaintiff after both sides had rested, and in neither of these Courts did the defendant the City of Waco claim any right against the United States Fidelity and Guaranty Company, nor did it then make such Company a party to such litigation, and plaintiff says that it is now brought into this action without good faith, and solely for the purpose of unlawfully destroying the jurisdiction of this Court.

5

Plaintiff further shows to the Court that the defendant the City of Waco did not obtain leave of Court to file its cross-action and bring the said United States Fidelity and Guaranty Company into this suit, and that it should not now be permitted to do so, because to do so will unduly delay the plaintiff.

Wherefore, plaintiff prays that the petition to remove this cause be denied, and that the defendant United States Fidelity and Guaranty Company be dismissed from this action, or if permitted to remain in this action that it be required to file its pleadings in this Honorable Court, and for general and special relief.

Weatherby & Rogers, Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 37-39] Bond on removal for $500.00, approved and filed June 8, 1932, omitted in printing.

[fol. 40] Bill of costs omitted in printing.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] In United States District Court, Western District of Texas, Waco Division

Original Answer of Defendant United States Fidelity & Guaranty Company—Filed July 25, 1932

Now comes the United States Fidelity & Guaranty Company, a foreign corporation, and in answer to the cross-action of the City of Waco filed herein files this its first original answer, and for such would show as follows:

1

Defendant excepts generally to the allegations in City of Waco's said cross-action contained and says the same are insufficient in law to enable said City of Waco to recover as prayed for, and of this defendant prays the judgment of the Court.

2

And further answering, if need there be, this defendant denies all and singular the allegations in City of Waco's [fol. 42] said cross-action contained and demands strict proof thereof.

Wherefore this defendant prays that the City of Waco take nothing by its cross-action against this defendant and that it go hence without day and recover all costs in this behalf expended.

S. P. Brooks, Jr., Spell, Naman & Howell, Attorneys for Defendant United States Fidelity & Guaranty Company.

[File endorsement omitted.]

In United States District Court

Motion to Remand to State Court—Filed March 13, 1933

Now comes the plaintiff in the above numbered and entitled cause and moves this court to remand this cause to the 74th Judicial District Court in and for McLennan County, State of Texas, on the grounds that this court is without jurisdiction to hear and determine this cause for the following reasons:

1. The suit against the United States Fidelity and Guaranty Company was not brought by the plaintiff in the court below, but is a cross complaint by the defendant, the City of Waco, against said defendant, and the same does not constitute a separable controversy within the meaning of the laws of the United States.

2. Because the suit which the defendant, the City of [fol. 43] Waco, has undertaken to inject into the main suit by the plaintiff against the City of Waco and Combs and Glade, is improperly joined and is not sufficient to disturb the jurisdiction of the State Court.

3. Because the defendant, the City of Waco, has colluded with the defendant United States Fidelity and Guaranty Company in an effort to deprive the State Court of its jurisdiction in that the bond upon which the defendant the City of Waco has brought its action was a joint and several bond made by the defendants Combs and Glade, each of whom is a resident citizen of the State of Texas, and by one Davis Stribling as Surety thereon, who is a resident citizen of the State of Texas and by the United States Fidelity and Guaranty Company, and the City of Waco has brought its action against the United States Fidelity and Guaranty Company alone in an effort to make a separable controversy with such non-resident where none in fact exists, and the said United States Fidelity and Guaranty Company has joined in such collusion in failing and refusing to make the joint makers of said bond parties to the said action, all of which constitutes an effort on the part of the City of Waco and the said United States Fidelity and Guaranty Company to oust the State Court of its rightful jurisdiction over this cause.

4. The cause of action alleged by the City of Waco against the United States Fidelity and Guaranty Company could not proceed to trial and could not be separated from the original action and tried alone in this Court, because a judgment against the defendants Combs and Glade is a prerequisite to any judgment against the United States Fidelity and Guaranty Company, and before liability can [fol. 44] be fixed as against the United States Fidelity and Guaranty Company, the amount thereof must be first determined in an action against the defendants Combs and Glade and the City of Waco.

5. Because this is a suit entirely between the plaintiff Curtis Boggs and the defendants Combs and Glade, both of whom are resident citizens of the State of Texas, and the City of Waco, a municipal corporation and citizen of the State of Texas, and the purported action as against the United States Fidelity and Guaranty Company is incidental and ancillary to the main controversy, all of which constitutes but one cause of action, which is not separable.

Wherefore, plaintiff prays that this entire cause be remanded to the said State Court of the State of Texas, and in the alternative that the suit of this plaintiff against the defendants Combs and Glade and the City of Waco be remanded to said court, and also in the alternative that the suit as against the United States Fidelity and Guaranty Company by the City of Waco, as evidenced by the cross complaint of the City of Waco, be dismissed and the balance of this action be remanded to the said State Court.

Weatherby & Rogers, by G. B. Rogers, Attorneys for plaintiff.

[File endorsement omitted.]

[fol. 45] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO REMAND AND DISMISSING AS TO U. S. FIDELITY AND GUARANTY CO., AND REMANDING CAUSE—Filed March 23, 1933

On this the 23rd day of March, A. D. 1933, at a regular term of this Court came on to be heard the motion of plain-

tiff to remand this cause to the District Court, 74th Judicial District, McLennan County, Texas, and the Court having considered said motion, is of opinion that there is in this cause a separable controversy as between the City of Waco and the United States Fidelity and Guaranty Company, and that by reason thereof this is a removable cause; and that said motion to remand should be overruled. It is therefore ordered, adjudged and decreed by the Court that plaintiffs' motion to remand be, and the same is hereby overruled.

And also came on to be heard at the same time plaintiffs' motion to dismiss the cross-complaint of the City of Waco against the United States Fidelity and Guaranty Company from his cause of action as against the defendants City of Waco and J. W. Combs and William P. Glade, and to remand the cause as between the plaintiff and the City of Waco and J. W. Combs and William P. Glade, and the Court having considered said motion is of opinion that, as to the plaintiffs' cause of action, the United States Fidelity and Guaranty Company is an unnecessary and improper party, and that plaintiffs' motion to dismiss as to the United States Fidelity and Guaranty Company should be granted.

It is therefore ordered, adjudged and decreed by the Court that the motion of Curtis Boggs, plaintiff, to dismiss the cause of action of the City of Waco as against the United States Fidelity and Guaranty Company be, and the same is hereby in all things granted.

[fol. 46] It thereupon appearing to the Court upon dismissal of the United States Fidelity and Guaranty Company as above ordered that there is no diversity of citizenship in the cause of Curtiss Boggs as against the original defendants herein, to wit, J. W. Combs and William P. Glade and the City of Waco, and that the Court has no jurisdiction over said cause of action.

It is therefore ordered, adjudged and decreed by the Court that the cause of action of Curtis Boggs against J. W. Combs and William P. Glade and the City of Waco be, and the same is hereby in all things remanded to the District Court, 74th Judicial District, McLennan County, Texas, and the cross-complaint of the City of Waco against the United States Fidelity and Guaranty Company be, and the same is hereby dismissed.

It is further ordered that said City of Waco pay all costs of this removal, to all of which the defendant City of Waco excepts. The defendant City of Waco excepts to the foregoing judgment and in open court gives notice of appeal to the United States Circuit Court of Appeals.

Charles A. Boynton, Judge.

Approved as to form.

Weatherby & Rogers, Attorneys for the Plaintiff, Curtis Boggs. John McGlasson, Attorneys for the Defendant, City of Waco. Spell, Naman & Howell, S. P. Brooks, Jr., Attorneys for the Defendant, United States Fidelity and Guaranty Company. Chas. I. Francis, Attorney for Combs & Glade.

[File endorsement omitted.]

[fol. 47] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL. Filed June 19, 1933

To the said Honorable Court:

Now comes the defendant, City of Waco, and says that on the 23rd day of March, A. D. 1933, this Court entered judgment in the above case dismissing the cross-complaint of the City of Waco against the United States Fidelity & Guaranty Company in which judgment, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the defendant, City of Waco, for the reasons set forth in the assignment of errors filed herewith, prays an appeal from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, for the correction of the errors so complained of, that a citation may be issued as provided by law, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals under the rules of said court in such cases made and provided.

John McGlasson, Geo. W. Morrow, Attorneys for Defendant, City of Waco.

[File endorsement omitted.]

[fol. 48] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING BOND—Filed June 19, 1933

The petition of appeal of defendant, City of Waco, is hereby granted and allowed as prayed for. It is hereby ordered that the amount of bond on appeal be and hereby is fixed in the sum of Two Hundred ($200.00) Dollars, which bond may be executed by the defendant, as principal, by its attorney herein, and by such surety or sureties as shall be approved by this Court.

Dated this the 19th day of June, A. D. 1933.

Charles A. Boynton, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

WAIVER OF ISSUANCE AND SERVICE OF CITATION AND NOTICE OF APPEAL—Filed June 23, 1933

The plaintiff, Curtis Boggs, hereby waives issuance and service of citation and notice of appeal in the above entitled and numbered cause and hereby enters his appearance in the United States Circuit Court of Appeals for the Fifth Circuit of New Orleans, Louisiana, in the appeal of the above entitled and numbered cause this the 22nd day of June, A. D. 1933.

Weatherby & Rogers, by O. M. Weatherby, Attorney- for Plaintiff, Curtis Boggs.

[fol. 49] The defendant, United States Fidelity & Guaranty Company, hereby waives issuance and service of citation and notice of appeal in the above entitled and numbered cause and hereby enters its appearance in the United States Circuit Court of Appeals for the Fifth Circuit of New Orleans, Louisiana, in the appeal of the above entitled and numbered cause this the 22nd day of June, A. D. 1933.

Naman, Howell & Brooks, S. P. Brooks, Jr., Attorney- for Defendant, United States Fidelity & Guaranty Co.

The defendants, J. W. Combs and Wm. P. Glade, hereby waive issuance and service of citation and notice of appeal in the above entitled and numbered cause and hereby enter their appearance in the United States Circuit Court of Appeals for the Fifth Circuit of New Orleans, Louisiana, in the appeal of *of* the above entitled and numbered cause this the 22nd day of June, A. D. 1933.

Chas. I. Francis, Attorney for Defendants, J. W. Combs and Wm. P. Glade.

[File endorsement omitted.]

[fols. 50–53] Bond on appeal for $200.00, approved and filed June 22, 1933 omitted in printing.

[fol. 54] In United States District Court

Assignment of Errors—Filed June 19, 1933

To the said Honorable Court:

Now comes the defendant, City of Waco, in connection with and as a part of its petition for appeal, and assigns the following errors which it avers were committed by the District Court in its rulings and orders in said cause, and upon which defendant, City of Waco, relies to reverse the judgment entered herein, as appears by the record.

Assignment of Error Number One

That the Court erred in dismissing the cross-complaint of the City of Waco against the United States Fidelity & Guaranty Company because said cross-complaint as pleaded was not and did not constitute a misjoinder of causes of action.

Assignment of Error Number Two

That the Court erred in dismissing the cross-complaint of the City of Waco against the United States Fidelity & Guaranty Company because said cross-complaint as pleaded was not and did not constitute a misjoinder of parties.

[fol. 55] Assignment of Error Number Three

That the Court erred in dismissing the cross-complaint of the City of Waco against the United States Fidelity & Guaranty Company because there was no proper and legal plea of misjoinder of causes of action filed in this cause.

Assignment of Error Number Four

That the Court erred in dismissing the cross complaint of the City of Waco against the United States Fidelity & Guaranty Company because there was no proper and legal plea of misjoinder of parties filed in this cause.

Assignment of Error Number Five

That the Court erred in dismissing the cross-complaint of the City of Waco against the United States Fidelity & Guaranty Company because if a proper and legal plea of misjoinder of causes of action was filed, which is not admitted but denied, such plea of misjoinder was waived in that same was not filed in limine, same not having been filed at the first term of the court after the filing of such cross-complaint of the defendant, City of Waco.

Assignment of Error Number Six

That the Court erred in dismissing the cross-complaint of the City of Waco against the United States Fidelity & Guaranty Company because if a proper and legal plea of misjoinder of parties was filed, which is not admitted but denied, such plea of misjoinder was waived in that same was not filed in limine, same not having been filed at the first term of the court after the filing of such cross-complaint of the defendant, City of Waco.

[fol. 56] Wherefore, defendant, City of Waco, prays that said errors be corrected and that the judgment of the District Court be reversed.

John McGlasson, Geo. W. Morrow, Attorneys for Defendant, City of Waco.

[File endorsement omitted.]

In United States District Court

Præcipe for Transcript with Waiver Filed June 23, 1933

To the Clerk of the above entitled Court:

Please include in the transcript on appeal in the above entitled and numbered cause in the order named, the following:

(1) Caption.
(2) Transcript on removal from District Court of McLennan County, Texas.
(3) Original answer of defendant, United States Fidelity & Guaranty Company.
(4) Motion to remand to State court.
(5) Order overruling motion to remand, dismissing the United States Fidelity & Guaranty Company and remanding cause to the State court.
(6) Petition for appeal.
(7) Order allowing appeal and fixing amount of bond.
[fol. 57] (8) Waiver of issuance and service of citation and notice of appeal.
(9) Appeal bond.
(10) Assignment of errors.
(11) Præcipe for transcript with waiver.
(12 Clerk's certificate.

John McGlasson, Attorney for Defendant, City of Waco.

Service of above præcipe and time are hereby waived this the 22nd day of June, 1933.

O. M. Weatherby, Weatherby & Rogers, Attorney for Plaintiff, Curtis Boggs. Chas. I. Francis, Attorney for Defendants, J. W. Combs and Wm. P. Glade. Naman, Howell & Brooks, S. P. Brooks, Jr., Attorney for Defendant, United States Fidelity & Guaranty Co.

[File endorsement omitted.]

[fol. 58] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] Minute entry of argument and submission, Nov. 7, 1933, omitted in printing.

[fol. 60] In United States Circuit Court of Appeals for Fifth Circuit

No. 7045

The City of Waco, Texas, a Municipal Corporation, Appellant,

versus

United States Fidelity & Guaranty Company, a Corporation, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

Before Bryan, Foster and Hutcheson, Circuit Judges

Opinion of the Court—Filed December 11, 1933

Hutcheson, Circuit Judge:

Curtis Boggs, a citizen of Texas sued Combs & Glade, contractors, both citizens of Texas, and the City of Waco, for damages received from running his car into an obstruction in a public street. The City by cross action, as permitted by the Texas practice, vouched in the United States Fidelity & Guaranty Company, a citizen of Maryland, surety on the bond of Combs & Glade, alleging its obligation as [fol. 61] surety to pay any liability created against the City by the acts of the contractors, and praying that if upon final trial plaintiff have judgment against the City, the City have judgment over against the Fidelity Company for a like amount. On the ground that a separable controversy existed, the Fidelity Company removed the cause to the Federal court.

Plaintiff contested the removal in the State court, and on March 13 moved in the Federal court for a remand. The motion denied the existence of a separable controversy, and therefore the removability of the suit, on the grounds: (1) that the removing defendant having come into the ca. se,

not at the suit of plaintiff, but on the cross action of a defendant, no separable controversy existed. (2) That there was improper joinder in bringing the Fidelity Company into the suit by cross action of the City; (3) that the cross action and the removal proceedings were collusively filed to defraud the State court of its jurisdiction; (4) that the controversy asserted by the cross action was not in its nature separable, but was ancillary and incidental to the main suit, judgment in it being dependent on plaintiff's obtaining judgment in the main suit. The prayer was that the entire cause be remanded, and in the alternative, that the cross action of the City be dismissed and the balance of the action remanded.

The District Judge disposed of these prayers in a single order. He first denied the prayer that the entire cause be remanded; then finding the Fidelity Company to be an improper and an unnecessary party to plaintiff's cause of action, he granted plaintiff's motion to dismiss as to it, and finding further that the granting of that motion left the court without jurisdiction of the cause, ordered the plaintiff's suit against the City of Waco remanded and the cross complaint of the City against the Fidelity Company dismissed.

[fol. 62] The City of Waco excepted to the whole judgment and gave notice of appeal. Its petition for appeal, however, limited the appeal to that portion of the order purporting, after the cause had been remanded, to dismiss the cross action.

An order sustaining the demurrer to and striking out a pleading, or dismissing a cause of action, is ordinarily appealable. Floody vs. Chicago St. P. M. & O. Ry., 116 N. W. 111; Major Ruff vs. Gay, Recev., — Fed. (2) —.

The order complained of here would be, but for the fact that the entry of the remanding order rendered the order appealed from ineffective for want of jurisdiction, made moot all further proceedings in the Federal court, and left the cause to stand and continue in the State court as though it had not been removed. Hammond Hotel & Imp. Co. vs. Finlayson, 6 Fed. (2) 446; Wabash Ry. vs. Lindley, 29 Fed. (2) 829; National Farmers Bank vs. Moulton, 32 Fed. (2) 78; Floody vs. Chicago, 116 N. W. 111; Levinski vs. Middlesex Banking Co., 92 Fed. 449, and this is true whether abstractly the order of remand was rightly or

wrongly entered. Ex Parte Matthew Addy, 256 U. S. 417. For by statute that order is conclusive on State and Federal courts, and neither may in any way or at any time question it, or examine into its grounds. Howell vs. Hartford, 159 S. E. 380; Powell vs. Chesapeake, 169 U. S. 92. Relief against it can be had neither by appeal, Humphreys vs. Love, 61 Fed. (2) 908; nor by mandamus, Wabash vs. Woodrough, 29 Fed. (2) 832, Ex Parte Matthew Addy, supra. The mandate of the statute, that an order of remand shall be final, so that neither directly nor by any form of indirection, either it or the grounds on which the order was based may be reviewed, is absolute and comprehensive. Gurnee vs. Patrick County, 137 U. S. 144; Yankaus vs. Feltenstein, 244 U. S. 133; Chicago St. P. M. & O. Ry. vs. Hensley, 25 Fed. (2) 861; Marchant vs. Meade Mor-[fol. 63] rison Mfg. Co., 11 Fed. (2) 368; Pacific Livestock Co. vs. Lewis, 241 U. S. 440.

This is so whether the attempt is, as it was in Marchant vs. Meade, 29 Fed. (2) 40, to have a second try at a review; c f McLoughlin Bros. vs. Hollowell, 228 U. S. 278, or as was the case in Wabash vs. Lindley, 29 Fed. (2) 829, merely an ingenious first effort to secure an indirect review of the remand order, by coupling it with other proceedings connected with or leading up to it.

Because then, it appears on the face of the appeal papers that there is now no case pending in the Federal court, that all matters concerning the entire controversy, both those presented by the cross bill, and those presented by the main suit are now, because of the remand, pending in the State court and for its action, unaffected by the attempt of the Federal court to dismiss the City's cross action, that the matters involved in this appeal are moot, and that this is an effort, by indirection, to review the grounds of the order of remand, the appeal is dismissed.

[fol. 64] In United States Circuit Court of Appeals

No. 7045

The City of Waco, Texas, a Municipal Corporation,

versus

United States Fidelity & Guaranty Company, a Corporation, et al.

Judgment—December 11, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the said appeal be, and the same is hereby, dismissed;

It is further ordered and adjudged that the appellant, The City of Waco, Texas, a Municipal Corporation, and the surety on the appeal bond herein, Continental Casualty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fols. 65-71] Appellant's petition for rehearing covering 7 pages, filed Dec. 29, 1933, omitted from this print. It was denied, and nothing more, by order of Jan. 13, 1934.

[fols. 72-76] Petition for rehearing of U. S. Fidelity & Guaranty Co. covering 5 pages, filed Dec. 29, 1933, omitted from this print. It was denied, and nothing more by order of Jan. 13, 1934.

[fol 77] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Petitions for Rehearing—January 13, 1934

It is ordered by the Court that the petitions for rehearing filed in this cause be, and the same are hereby, denied.

[fol. 78] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 79] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 30, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,486. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 5. The City of Waco, Texas, Petitioner, vs. United States Fidelity & Guaranty Company et al. Petition for a writ of certiorari and exhibit thereto. Filed March 22, 1934. File No. 5, O. T., 1934.

FILE COPY

FILED
MAR 22 1934
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. [redacted] 5

THE CITY OF WACO, TEXAS, A MUNICIPAL CORPORATION,

Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

J. WALTER COCKE,
Attorney for Petitioner.

JOHN MCGLASSON,
Of Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for a writ of certiorari	1
Summary statement of the matter involved	1
Reasons relied on for allowance of the writ	4
Prayer for writ	8
Brief in support of petition for writ of certiorari	9
I. The opinion of the court below	9
II. Jurisdiction	9
III. Statement of the case	10
IV. Specification of errors	10
V. Argument	12
Point 1	12
Point 2	13
Point 3	14
Point 4	15
Conclusion	17

Table of Cases Cited.

Adams v. National Bank, 178 S. W. 993, 996	6, 7, 14, 16
Associated Employers Reciprocal v. Brown (Tex. Civ. App.) 56 S. W. (2d) 183	15
Bank v. Bank, 77 S. W. 241	6, 14
Barton v. Farmers' State Bank et al., 276 S. W. 177, 179	7, 16
City of Waco, Texas, a Municipal Corporation, v. United States Fidelity & Guaranty Company, a corporation, et al., 67 Fed. (2d) 785	9
Compania Minera Y. Compradora, etc., v. American Metal Co. (D. C. Tex. 1920) 262 Fed. 183	13
Fall et al. v. Weber, 47 S. W. (2d) 365, 366	7
Floody v. Chicago, St. P., N. O. Ry. Co., 116 N. W. 111	12
Garner v. Jamison et al., 162 S. W. 940, 941	7
Harris v. Cain, 91 S. W. 869	6, 14
Hill v. Chicago E. R. Co., 140 U. S. 52, 35 L. Ed. 331, 11 Sup. Ct. 690	12, 13
Kennedo v. Fruit Co., 131 S. W. 73, 76	6, 7, 14
Labor Bank & Trust Co. v. Adams et al., 23 S. W. (2d) 814, 815	6
Metzger v. Pacific Mutual Life Insurance Co., 30 S. W. (2d) 428, 430, 431	7
Moore-Seaver Grain Co. v. Blum Milling Co., 264 S. W. 551, 552	7
National Surety Company v. Atascosa Ice, Water & Light Co. (Tex. Comm. App.) 273 S. W. 821, 823-825	6, 14

Page

Phenix Insurance Co. v. Charleston Bridge Co., 65 Fed. 628 15
St. Louis, etc., R. Co. v. Knight, 122 U. S. 79, 7 S. Ct. 1132, 30 L. Ed. 1077 ..... 7, 15
Texas Packing Company v. St. Louis S. W. Ry. Co. (Comm. of App.), 227 S. W. 1095 7
Weekes v. Sunset Brick & Tile Co. (Tex. Civ. App.), 56 S. W. 243, 247 7

TABLE OF STATUTES CITED.

Revised Civil Statutes of Texas, 1925, Article 2010 ..... 6, 15
28 U. S. C. A., Section 724 ..... 13, 15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 883

THE CITY OF WACO, TEXAS, A MUNICIPAL CORPORATION,

Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, ET AL.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the City of Waco, Texas, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This is a suit originally filed in the Seventy-fourth District Court of McLennan County, Texas, by Curtis Boggs of McLennan County, Texas, against the City of Waco, a municipal corporation of McLennan County, Texas, and J. W. Combs and Wm. P. Glade, each resident citizens of Wichita County, Texas, doing business as Combs & Glade,

for damages in the sum of $51,125.00 for personal injuries alleged to have been sustained on one of the streets of the City of Waco. Plaintiff's cause of action is set forth in his original petition (R. 3). In this petition plaintiff set forth the paving contract entered into between the City of Waco and the other defendants for paving Maple Avenue in said city and alleged negligence on the part of the said Combs & Glade in leaving an embankment at the intersection of said Maple Avenue and North 18th Street, which was alleged to be the proximate cause of plaintiff's injuries. Defendant City of Waco filed a cross action over against the United States Fidelity & Guaranty Company, a corporation under the laws of the State of Maryland, alleging that at the time it entered into a contract with defendants Combs & Glade for paving said Maple Avenue the United States Fidelity & Guaranty Company executed and delivered to the City of Waco its obligations agreeing and binding itself to hold the City of Waco harmless from any claims growing out of or connected with any act of the defendants Combs & Glade (R. 18). Thereafter on the 7th day of July, 1932, transcript of removal was filed in the office of the Clerk of the District Court of the United States for the Western District of Texas (R. 41). During the second term of the United States District Court thereafter plaintiff filed his motion to remand the cause to the State Court (R. 42) praying that the cause be remanded to the State Court and, in the alternative, that the suit of the plaintiff against the defendants Combs & Glade and the City of Waco be remanded to said court, and also, in the alternative, that the suit as against United States Fidelity & Guaranty Company by the City of Waco, as evidenced by the cross-complaint of the City of Waco, be dismissed and the balance of the action be remanded to the State Court (R. 44). The court thereupon on the 23rd day of March, 1933, entered its order overruling the motion to

remand, then dismissed the United States Fidelity & Guaranty Company from the case and remanded the case as to the plaintiff and defendants Combs & Glade and the City of Waco, to which the defendant City of Waco excepted and gave notice of appeal (R. 45).

Appeal from the order dismissing the United States Fidelity & Guaranty Company from the cross-action of the defendant City of Waco was duly perfected by defendant City of Waco to the United States Circuit Court of Appeals for the Fifth Circuit, based upon six specifications of error.

The question involved in appellant's first and second specifications of error was whether or not the cross complaint of the City of Waco against the United States Fidelity & Guaranty Company constituted a misjoinder of parties and causes of action.

The question involved in appellant's third and fourth specifications of error was whether or not a proper and legal plea of misjoinder of causes of action and parties had been filed.

The question involved in appellant's fifth and sixth specifications of error was whether or not pleas of misjoinder had been waived by failure to file same *in limine* at the first term of court after the filing of such cross complaint of defendant City of Waco.

The Honorable United States Circuit Court of Appeals rendered its opinion December 11, 1933, and dismissed the appeal under the erroneous assumption that the trial court had dismissed United States Fidelity & Guaranty Company after said trial court had remanded the cause to the State court (R. 59-62). Thus, the Honorable United States Circuit Court of Appeals inadvertently erred in that it predicated its decision upon a misstatement or misconception of the facts.

The trial court entered one decree in this case but it could have been and had the same effect as if it had been three

separate orders or decrees. That order as entered disposed of the case in the following manner and in the following sequence:

(1) The trial court held that a separable controversy existed, that the case was removable and was properly removed, and *overruled* the motion to remand the entire cause.

(2) The trial court held that the Fidelity Company was an unnecessary and improper party, and then *dismissed* the Fidelity Company.

(3) The trial court then observed after the dismissal of the Fidelity Company that no diversity of citizenship existed in the case as it *then* stood and then remanded the remaining part of the case.

By referring to the order of the trial court (R. 45) it will be observed that the sequence was as above set forth.

A petition for rehearing was filed December 29, 1933, in the United States Circuit Court of Appeals, same being a timely application for rehearing in said court, and the petition for rehearing was denied January 13, 1934 (R. 77).

Petitioner files herewith a certified copy of the transcript of record of this cause, including the proceedings in the said United States Circuit Court of Appeals.

B.

Reasons Relied on for the Allowance of the Writ.

The decision of the United States Circuit Court of Appeals for the Fifth Circuit dismissing petitioner's appeal was erroneous and the action of the trial court in dismissing United States Fidelity & Guaranty Company from the cross-action of your petitioner City of Waco was erroneous for the following reasons relied on by the petitioner for the allowance of the writ of certiorari.

First:

Said decision of the Honorable United States Circuit Court of Appeals dismissing the appeal was based upon an inadvertent error as to the orders of the trial court in this cause and the sequence thereof. The Honorable Circuit Court inadvertently stated that the trial court remanded the case and the cross-action of the City of Waco against the Fidelity Company was dismissed. Upon a reading of the trial court's order (R. 45) it will be apparent that the dismissal of the Fidelity Company took place at a time when the Federal trial court had jurisdiction over the entire cause and before the remand order was made. The Honorable Circuit Court of Appeals properly held that an order dismissing a cause of action is appealable, but said court decided the appeal and dismissed same upon the erroneous understanding of the facts.

If this petition for allowance of writ of certiorari is granted and petitioner's appeal is reinstated the action of the trial court in dismissing the Fidelity Company from the City of Waco's cross-action will be reversed for the following reasons, which are relied upon by the petitioner for the allowance of the writ of certiorari.

Second:

The cross-action of the defendant City of Waco against the United States Fidelity & Guaranty Company was properly joined with the action of plaintiff for his injuries against the contractors, Combs & Glade, and the City of Waco because all matters grew out of the same transaction, relating to the same subject-matter and were dependent in their principal features upon the same evidence and there was no misjoinder of causes of action or parties.

The action of the trial court in dismissing said cross-action is in conflict with the decisions of the local courts in Texas in the following cases, which hold that such cross-action does not constitute misjoinder of causes of action or parties.

National Surety Company v. *Atascosa Ice, Water & Light Company*, 273 S. W. 821, 823-825;

Labor Bank & Trust Company v. *Adams et al.*, 23 S. W. (2d) 814, 815;

Bank v. *Bank*, 77 S. W. 241;

Harris v. *Cain*, 91 S. W. 869;

Kemendo v. *Fruit Co.*, 131 S. W. 73, 76;

Adams v. *National Bank*, 178 S. W. 993, 996.

Third:

There was no proper and legal plea of misjoinder of causes of action or parties filed in this case. The only plea filed being the motion to remand filed by plaintiff, giving as grounds for the motion to remand an alleged misjoinder of the United States Fidelity & Guaranty Company and such motion was not verified, as required by law.

Plaintiff's motion to remand to the State Court clearly was not a plea of misjoinder, the allegations of misjoinder being set out as grounds of his motion to remand the cause.

Furthermore, the motion was not verified by affidavit as required by Revised Civil Statutes of Texas, 1925, Article 2010 reading as follows:

> "An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit:
>
> "(5) That there is a defect of parties, plaintiff or defendant."

Fourth:

Should plaintiff's motion to remand be considered a plea of misjoinder, such misjoinder plea was waived in that such plea or motion was not filed at the first term of court after the defendant City of Waco filed its cross-complaint against the United States Fidelity & Guaranty Company.

The action of the trial court in dismissing the Fidelity Company from the cross-action of the City of Waco was in conflict with decisions of the United States Supreme Court in *St. Louis, etc., R. Co.* v. *Knight*, 122 U. S. 79, 7 Sup. Ct. Rep. 1132, 30 L. Ed. 1077, holding that as to the time to plead in Federal court, the State statutes and practice will be followed and the State statutes as to the verification of pleadings regulate the pleadings in similar cases at law in the Federal court.

Said order of dismissal was in conflict with the local decisions of the State of Texas in the following cases:

Adams v. *First National Bank of Waco et al.*, 178 S. W. 993, 996;

Fall et al. v. *Weber*, 47 S. W. (2d) 365, 366;

Metzger v. *Pacific Mutual Life Insurance Company*, 30 S. W. (2d) 428, 430-431;

Moore-Seaver Grain Co. v. *Blum Milling Co.*, 264 S. W. 551, 552;

Barton v. *Farmers' State Bank et al.*, 276 S. W., 177, 179;

Kemcado v. *Fruit Dispatch Co.*, 131 S. W. 73, 76; (Writ of Error dismissed by Supreme Court);

Garner v. *Jamison et al.*, 162 S. W. 940, 941;

Texas Packing Company v. *St. Louis S. W. Ry. Co.* (Com. of App.), 227 S. W. 1095;

Weekes v. *Sunset Brick & Tile Co.* (Tex. Civ. App.), 56 S. W. 243, 247.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket Number 7045, The City of Waco, Texas, a Municipal Corporation, Appellant, *vs.* United States Fidelity & Guaranty Company, a Corporation, *et al.*, Appellees, and that the said decree and/or judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court and the judgment of the trial court be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

CITY OF WACO,
By J. WALTER COCKE,
Counsel for Petitioner.

JOHN MCGLASSON,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 883

THE CITY OF WACO, TEXAS, A MUNICIPAL CORPORATION,
Petitioner.

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of United States Circuit Court of Appeals for the Fifth Circuit is reported in 67 F. (2d) 785; and is further shown on pages 59 to 62, inclusive, of the transcript of the record.

II.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this cause was rendered on the 11th day of December, 1933 (R. 59 to 62) and the petition for rehearing herein was filed December 29, 1933 and same was denied January 13, 1934 (R. 77).

The United States Circuit Court of Appeals dismissed the appeal without passing upon the specifications of error in appellant's brief.

It is sought to bring this case before this Court on a petition for writ of certiorari as provided for in Section 240 of the Judicial Code of the United States as amended by the Act of February 13, 1925.

It is submitted that this is a case which this Court should supervise by granting a writ of certiorari since the decision of the said Circuit Court of Appeals is contrary to the law of fundamental jurisdiction of an appellate court and the decision of the trial court in dismissing United States Fidelity & Guaranty Company from the cross-action of the City of Waco is contrary to every holding of the Federal and State courts, as set out in petitioner's reasons for the allowance of the writ (pages 4 to 7 herein).

III.

Statement of the Case.

A full and concise statement of the case has been heretofore made in the petition for writ of certiorari under head (A) and, in the interest of brevity, the statement is not repeated at this point.

IV.

Specification of Errors.

First.

The United States Circuit Court of Appeals for the Fifth Circuit erred in dismissing the appeal in that said finding and holding was based upon an inadvertent error as to the orders of the trial court in this cause and the sequence thereof. The Honorable Circuit Court inadvertently stated that the trial court remanded the case and the cross-action

of the City of Waco against the Fidelity Company was dismissed. Upon a reading of the trial court's order (R. 45) it will be apparent that the dismissal of the Fidelity Company took place at a time when the Federal trial court had jurisdiction over the entire cause and before the remand order was made. The Honorable Circuit Court of Appeals properly held that an order dismissing a cause of action is appealable, but said court decided the appeal and dismissed same upon the erroneous understanding of the facts.

Second.

The trial court erred in finding and holding that the cross-action of the defendant City of Waco against United States Fidelity & Guaranty Company was improperly joined with the action of plaintiff for his injuries against the contractors, Combs & Glade, and the City of Waco, for the reason that all matters grew out of the same transaction, relating to the same subject-matter and were dependent in their principal features upon the same evidence and there was no misjoinder of causes of action or parties.

Third.

The trial court erred in finding and holding that the cross-action of the defendant City of Waco against United States Fidelity & Guaranty Company was improperly joined with the action of plaintiff for his injuries against the contractors, Combs & Glade, and the City of Waco, for the reason that there was no proper and legal plea of misjoinder of causes of action or parties filed in this case. The only plea filed being the motion to remand filed by plaintiff, giving as grounds for the motion to remand an alleged misjoinder of the United States Fidelity & Guaranty Company and such motion was not verified, as required by law.

Fourth.

The trial court erred in finding and holding that the cross-action of the defendant City of Waco against United States Fidelity & Guaranty Company was improperly joined with the action of plaintiff for his injuries against the contractors, Combs & Glade, and the City of Waco, for the reason that should plaintiff's motion to remand be considered a plea of misjoinder, such misjoinder plea was waived in that such plea or motion was not filed at the first term of court after the defendant City of Waco filed its cross-complaint against the United States Fidelity & Guaranty Company.

V.

ARGUMENT.

Point 1.

This appellant "by cross-action, as permitted by the Texas practice, vouched in the United States Fidelity & Guaranty Company". (The foregoing words in quotation are quoted from the opinion of the United States Circuit Court in this cause (R. 60). The District Court over this appellant's objection dismissed the Fidelity Company from the action and did so at a time when it had jurisdiction over all parties to the suit and its order of dismissal was a final and appealable order and unless appealed from becomes final under the authority of *Hill* v. *Chicago E. R. Co.*, 140 U. S. 52, 35 L. Ed. 331, 11 Sup. Ct. Rep. 690 and *Floody* v. *Chicago St. P. N. O. Ry. Co.*, 116 N. W. 111. The city's right to retain the Fidelity Company in the case by cross-bill was permitted under the Texas practice and its appeal from the trial court's order dismissing the Fidelity Company should not and is not affected by an order remanding *a part of the case*, which order of remand was made by the

trial court *after* the Fidelity Company had been dismissed and after this appellant had been deprived of its relief by cross-bill.

Appellant does not question the law as set out in the opinion in this cause but earnestly and respectfully insists that the Honorable United States Circuit Court of Appeals inadvertently erred as to the facts. If the trial court had remanded the entire cause and then had sought to dismiss the Fidelity Company or if the Federal court had never properly had jurisdiction, then the effort of the trial court to dismiss would have been void for lack of jurisdiction, but under the facts as they exist in this case the Federal court had taken jurisdiction and overruled a motion to remand and its dismissal of the Fidelity Company was a final and appealable order and instead of presenting to this Court a moot question this appeal involves a question of vital importance to the City of Waco, for the dismissal of the Fidelity Company has deprived this appellant of its right which exists under the Texas practice to have the Fidelity Company in the same suit and to have all of the matters in controversy settled in one trial. Under *Hill* v. *Chicago Ry., supra*, unless the action of the Federal trial court is reversed it becomes *res judicata* in this cause and prevents the Fidelity Company from being vouched in again in the State court.

Point 2.

The record does not disclose a misjoinder of causes of action or parties. In actions at law the Federal courts follow the State practice with respect to the joinder of causes of action.

28 U. S. C. A., Section 724;

Compania Minera Y. Compradora, etc., v. *American Metal Company* (D. C. Tex. 1920), 262 Fed. 183.

In *National Surety Company* v. *Atascosa Ice, Water & Light Company* (Tex. Comm. App.), 273 S. W. 821, 823-825, the court held that in a depositor's action against a bank for deposits wrongfully abstracted and misappropriated by the bank's cashier, the bank was properly permitted by cross-action to implead the surety on the cashier's bond, where under the pleadings and proof the same evidence which authorized recovery by the depositor against the bank likewise authorized recovery by the latter against the surety. This is the latest word which we have been able to find from the court of last resort in our State.

Matters *ex contractu* and *ex delicto* may be joined where they grow out of the same transaction, relate to the same subject-matter and are dependent in their principal features on the same evidence, as they clearly are in the instant case.

Bank v. *Bank*, 77 S. W. 241;
Harris v. *Cain*, 91 S. W. 869;
Kemendo v. *Fruit Co.*, 131 S. W. 73, 76;
Adams v. *National Bank*, 178 S. W. 993, 996.

Applying the rules announced in the *Atascosa* case, *supra*, and other cases hereinabove cited, under the pleadings in the case at bar, the same evidence which would authorize recovery by plaintiff against defendants Combs & Glade and the City of Waco would authorize recovery by the latter against the Surety Company. Under the cases quoted and cited there was no misjoinder.

POINT 3.

Plaintiff's motion to remand to the State court clearly was not a plea of misjoinder, the allegations of misjoinder being set out as grounds of his motion to remand the cause.

Furthermore, the motion was not verified by affidavit as

required by Revised Civil Statutes of Texas, 1925, Article 2010 reading as follows:

> "An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit:
>
> (5) That there is a defect of parties, plaintiff or defendant."

Thus where an insurer appeared before the Industrial Accident Board as insurance carrier, made no objections to amendments to the petition in trial court impleading it as such, and filed no verified pleadings asserting defective parties, it could not raise the point on appeal. *Associated Employers Reciprocal* v. *Brown* (Tex. Civ. App.), 56 S. W. (2d) 483.

POINT 4.

If it should be considered that the plaintiff's motion to remand constituted a proper and legal plea of misjoinder, which is not admitted but denied, such plea was not properly considered for the reason that same was waived by plaintiff's failure to file same until after the beginning of the second term of the United States District Court after the cross-action of the defendant City of Waco had been filed.

As to the time to plead in Federal court, the State statutes and practice will be followed and the State statutes as to the verification of pleadings regulate the pleadings in similar cases at law in the Federal court.

28 U. S. C. A., Section 724;

Phenix Insurance Co. v. *Charleston Bridge Co.*, 65 Fed. 628;

St. Louis, etc., R. Co. v. *Knight*, 122 U. S. 79, Sup. Ct. Rep. 1132, 30 L. Ed. 1077.

In *Adams* v. *First National Bank of Waco et al.* (Tex. Civ. App.), 178 S. W. 993, 996, paragraph 7, the court said:

> "By failing to object to the joinder of the cross-defendants for more than a year after they had been made parties and had appeared and answered, and by agreeing to several continuances in the meantime, we think that the Bank waived its right to object on the score of delay to said defendants being made parties to this suit. * * * If it be conceded that the cross-defendants were proper, though not necessary, parties to the bank's cause of action, sustaining the exception to such joinder must be held to have been an abuse of the court's discretion."

The Commission of Appeals of Texas in *Barton* v. *Farmers' State Bank et al.*, 276 S. W. 177, 179, paragraphs 3-4, held that plaintiff and impleaded cross-defendant in not pressing objections to misjoinder of causes or parties on appearance day, but consenting to continuance to subsequent term, waived misjoinder and the rule forbidding misjoinder of cause or parties, being one of convenience, which should not be permitted to defeat the general policy of avoiding multiplicity of suits should be pleaded *in limine* or at first reasonable opportunity, and, if not seasonably made is waived. The court said:

> "No actual delay was encountered by reason of Barton's 'cross-action' and the impleading of Hutto. The case made by the bank's pleading was first triable at the January term, 1923; and Hutto was vouched in prior to the beginning of that term; he answered on its appearance day, and thereafter remained a party defendant. Both Hutto and the bank had ample opportunity, on January 2nd, and throughout the January term to press any objection of misjoinder of causes or parties."

So in the case at bar *no actual delay was encountered by reason of the City's "cross-action" and the impleading of*

the bonding company. The answer so impleading the bonding company was filed in the State court prior to the appearance day of the term of court to which the City was cited to appear. The United States Fidelity & Guaranty Company answered immediately and filed proper removal papers *and the case was first triable at the November term of* 1932. *The plaintiff had ample opportunity in November,* 1932, *and throughout the November term to press any objection of misjoinder of causes or parties.*

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that justice may be done and that the orders and actions of the trial court and United States Circuit Court of Appeals for the Fifth Circuit may be reversed, and that to such an end a writ of certiorari should be granted and this Court should review the decisions of the United States Circuit Court of Appeals for the Fifth Circuit, and finally reverse said decision and that of the trial court.

Respectfully submitted,

J. WALTER COCKE,
Counsel for Petitioner.

JOHN MCGLASSON,
Of Counsel for Petitioner.

(4746-C)

2r

FILE COPY

FILED
OCT 9 1
CHARLES ELMORE C

IN THE

Supreme Court of The United States

OCTOBER TERM, 1934

No. 5

THE CITY OF WACO, TEXAS, Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, ET AL., Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT, CURTIS BOGGS

TOM P. SCOTT
of Counsel.

G. B. ROGERS,
Attorney for Respondent,
Curtis Boggs.

INDEX

	Page
Statement of the Case	1
Summary of Argument	3
ARGUMENT—	
Answering Points 1 and 2 of Petitioner's Brief	5
Answering Point 3 of Petitioner's Brief	9
Answering Point 4 of Petitioner's Brief	9
Conclusion	11

TABLE OF CASES CITED

City of Waco vs. U. S. Fidelity & Guaranty Company, 67 Fed. (2) 785	9
Commercial Bank of Chicota vs. First State Bank & Trust Co of Santa Anna et al., 153 S. W. 1175, 1176	9
Faddler vs. Gabbert, 63 S. W. (2) 127	9
Fidelity Union Casualty Co. vs. Riley, 26 S. W. (2) 685, 686	10
Frey vs. Ft. Worth & Rio Grande Ry. Co. (Sup. Ct.) 25 S. W. 609; 86 Tex. 465	10
Hager vs. Stokes, 294 S. W. 835, 838; 116 Tex. 453	5
Lauderdale Co. vs. Kittel, 229 Fed. 593	11
Monument Pottery Co. vs. Imperial Coal Corp. (C. C. A. N. J.) 21 Fed. (2) 683; Certiorari denied, 48 Sup. Ct. 213; 276 U. S. 618; 72 L. Ed. 734	11
National Surety Co. vs. Atascosa Ice, Water & Light Company (Tex. Comm. App.) 273 S. W. 821	5-7
United States Fidelity & Guaranty Co. vs. Fosatti, 80 S. W. 74; 97 Tex. 497	6-8
Wabash Ry. Co. vs. Lindley, 29 Fed. (2) 829	7-10

TABLE OF STATUTES CITED

Rev. Stat. Tex. 1925, Article 2010, Sec. 5	9
Rev. Stat. Tex. 1925, Article 1790	5
U. S. C. Title 28, Sec. 391; Jud. Code, Sec. 269	11

IN THE

Supreme Court of The United States

OCTOBER TERM, 1934

No. 5

THE CITY OF WACO, TEXAS, Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, ET AL., Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT, CURTIS BOGGS

STATEMENT OF THE CASE

The respondent, Curtis Boggs, plaintiff in the trial court, would respectfully show to this Honorable Court, that he does not accept in full the statement of petitioner as contained in its application for writ of certiorari, pages 1-4, and desires to qualify same and add thereto.

There are two printed transcripts of the record filed herein, with the pages numbered differently, one omitting matters that are contained in the other.

We will refer to the first filed as "original record" and to the second or reprinted one as "record" to avoid confusion.

The petition for removal in the State court came on for hearing (original record p. 3) and while the hearing was in progress and before the State court rendered a decision as to whether or not it would be removed, and as to whether or not the cross-defendant United States Fidelity & Guaranty Company would be permitted to remain in the case as a party, the petitioner obtained its transcript of the record and filed same in the U. S. District Court. (Orig. R. pp. 40-41)

The complete record in the State court is not shown. It is not shown when the transcript was filed in the United States District Court. Copy of the bond which is relied upon and referred to throughout the petitioner's brief and application is not shown of record, although same was before the trial court. The only reference to the wording of the bond as contained in the record is an allegation as to part of what it contained in the pleadings filed below (R. 12-13) which allegation was denied by the bonding company. (R. 24) So far as the record is concerned, it is as much shown that there was no such bond, or that the bond, if any, contained no such provisions as alleged by petitioner, as it is shown otherwise.

The trial court held there was a separable controversy (R. 27) with the bond before him, which holding is sought to be sustained and is specially approved by petitioner, and which holding is inconsistent with any theory whereby the bonding company could be retained as a party in the State court as a matter of right.

With the record in this shape, the trial court held that the petitioner did not have a right to hold the bonding company in the case, when to do so might destroy the jurisdiction of the state court, unreasonably hinder and delay the trial of the cause there, which was entirely separable, and which would confuse the issues there as drawn between a citizen of Texas in his suit against other citizens of Texas. (R. 26-28)

SUMMARY OF ARGUMENT

Respondent will present his argument in favor of an affirmance of the holding of the United States District Court, based upon the following summary:

1. It is necessarily a part of petitioner's contention, as well as its expressed view, in order to sustain jurisdiction in the United States Court, that its controversy with the bonding company is wholly separable from, and not contingent upon, plaintiff's cause of action against it, and that there is no privity of contract between the plaintiff and the bonding company. This being true, it has no right, as a matter of law, to litigate such separable controversy in such manner as to delay the plaintiff's action against it, and so as to destroy the jurisdiction of the State court, and so as to inject into the original action matters which will confuse the issues as drawn therein and make it difficult to assess the costs in proper manner.

2. The only evidence in the record that petitioner had any sort of contract with the United States Fidelity & Guaranty Company being an allegation by petitioner that "the United States Fidelity & Guaranty Company executed and delivered to this defendant its obligation

agreeing and binding itself to hold this defendant harmless from any claim growing out of or connected with any act of the defendants, Combs & Glade, as set out in plaintiff's petition," (R. 12-13) which allegation was answered by the said guaranty company first by an exception as to its sufficiency, and second, by an express denial of said allegation (R. 24), and the trial court, with the alleged bond before him, having found that "as to plaintiff's cause of action, the United States Fidelity & Guaranty Company is an unnecessary and improper party, and that plaintiff's motion to dismiss as to the United States Fidelity & Guaranty Company should be granted," such holding, in the absence of a record showing that the trial court erred in his ruling, should be sustained.

3. Under the decisions of the highest court of the State of Texas, the right to interplead an indemnitor by a defendant who has been sued upon a separable cause of action, being a matter of discretion of the trial court, the United States District Court had the same right of discretion, and its order should be sustained in the absence of a showing of abuse of discretion.

4. This being an effort of petitioner to have reviewed in an indirect manner an order of remand to the State court, same is in contravention of U. S. Code.

5. It not being shown of record when the transcript from the State court was filed in the United States District Court, there is nothing upon which to base a specification of error that motion to dismiss the guaranty company was not filed in limine.

6. The motion to dismiss the guaranty company having been seasonably filed in the State court, and having

become a part of the transcript transferred to the United States court, same became part of the pleading in the United States court, and it was not necessary to refile same in said court.

7. A misjoinder of unnecessary parties in such manner as to unreasonably burden and confuse the plaintiff in his action against the original defendant, may be raised by plea in abatement, demurrer or special exception, and it is not necessary that same should be sworn to, or the trial court may, of its own accord, refuse to grant leave for the filing of an action over against third parties under a separable controversy.

ARGUMENT

Answering Points One and Two of Petitioner's Brief

Petitioner relies upon the case of National Surety Co. vs. Atascosa Ice, Water & Light Company, (Tex. Comm. App.) 273 S. W. 821. It will be noted that the Supreme Court did not adopt the opinion in that case, but only adopted the judgment which means that the case is not to be officially reported or considered as an authority. Rev. Stat. Texas 1925-Art. 1790; Hager vs. Stokes, 294 S. W. 835, 838 Par. 1; 116 Tex. 453.

The following excerpts from that opinion show that it is not analogous case to the case at bar:

> "the policy in suit was not only for the benefit of the bank, but expressly also for the benefit of any one else damaged by reason of such wrongful withdrawal of funds," * * * "and also its depositors." There was a privity of contract expressly provided for in this case."

It quotes with approval from the Supreme Court of Texas as follows:

> "It should be observed that Judge Williams held that the joinder in the Fossati Case would prejudice the rights of the parties. Where that is true, under the Skipworth case, and all others, no joinder would be authorized. Judge Brown clearly shows that in his opinion."

The existence of the right of a defendant in all cases to implead other parties who might become liable to him as a result of a judgment against him, regardless of other considerations, has been expressly negatived by an unbroken chain of authorities by the Supreme Court of Texas, cited with approval in United States Fidelity & Guaranty Co. vs. Fosatti, 80 S. W. 74, 97 Tex. 497.

The simple pleading by the petitioner that a surety company had agreed to hold it harmless from plaintiff's claim in the court below, without showing that the contract was in force at the time of the trial, and the various terms and conditions of the bond, with its many exceptions, was not a sufficient pleading, in the face of a demurrer, and when these alleged facts were specially denied by the bonding company, the denial, as a pleading, had as much force as the allegation of the existence of the bond. Petitioner does not bring up a record showing the offering of evidence, and, therefore, in this state of the record, the trial court had as much right to say there was no bond, as alleged, and in terms as alleged, as he had to say there was such a bond. The fact was, the court had the bond before him, and held that there was no such connection between its obligations and those of the City of Waco to plaintiff, as to authorize the city to hold the bonding company in

the case. By reason of the failure of the petitioner to include the bond in the record or to offer some proof, the burden being upon it after the denial was filed, it is not in position to even so much as claim that it had a bond, much less to have this honorable court draw conclusions as to its provisions. The trial court acted entirely within his province in adopting the denial as to the conditions of the bond rather than the petitioner's allegation, even in the absence of any evidence. Wabash Ry. Co. vs. Lindley, 29 Fed. (2) 829 1. c. 821. And realizing that a sharp issue was to be drawn as to the existence of the bond and as to the effect of its provisions and limitations, if it was in force, the court certainly had the right to say that plaintiff's action in tort should not be incumbered with such issues.

Petitioner admits in its brief (Point 2, Page 13) that "in actions at law, the Federal courts follow the State practice with respect to the joinder of causes of action." Under the state practice, where the controversy is entirely separable, it is purely a matter of the discretion of the trial judge as to whether or not a defendant may be permitted to interplead an indemnitor. National Surety Co. vs. Atascosa Ice, Water & Light Co. 273 S. W. 821 1. c. 824, quoting with approval authorities of the Supreme Court of Texas.

So far as this record discloses, the trial court may have concluded that there was collusion between the petitioner and the bonding company to obtain Federal court jurisdiction, and if pleadings shall be considered as evidence upon which the court might act, which is all that petitioner offers, then there was ample evidence of such collusion in the contest of the petition for removal (R.

21-23), and the footprints of said two parties acting in complete harmony so far as the question of jurisdiction is involved. This is almost conclusively found in the effort of petitioner to maintain Federal jurisdiction, although it was the bonding company which filed the petition and bond for removal, and the complaint of the bonding company against the judgment of the District Court. (Original R. 75).

What is said in U. S. F. & G. vs. Fossati, supra, is equally applicable to the case at bar, viz:

> "In order to enforce in this case the right contended for by the appellees, it would be necessary to hold, without qualification, that in all cases where a judgment against a defendant might give rise to a cause of action in his favor against another, he is entitled as a matter of right, to bring that other into the case. This court has never so held."

In contemplating the results of such a ruling, we may see that a citizen of Texas might have a more or less impecunious indemnitor in the State of Indiana, who would agree to hold him harmless against all of his losses and damages and contracts, and thus the entire mass of all litigation could be poured into the Federal courts, and the state courts effectively deprived of all jurisdiction, and the decision could be used as a vehicle for fraud and oppression especially in localities where courts do not meet very often. The petitioner's contention is that any and all contracts of indemnity, regardless of equities, delays, interference in the orderly proceedings of the courts and the confusion of issues, as a matter of right, where diversity of citizenship exists, entitles the indemnitor to be brought in and in turn to transfer the cause to the Federal court.

We think it is plain to be seen, that the real purpose of petitioner is to maintain jurisdiction of the Federal court, in the face of an order of remand, and if pleadings be evidence, as contended by petitioner, there is ample evidence of this fact in the contest of the petition for removal (R. p. 21-23) wherein it is shown that in a similar case where the same bond, covering the same Combs & Glade was involved, before the same Federal judge, but where jurisdiction was not at stake, no effort was made to bring the bonding company into the case. If this be an effort, indirectly, to appeal from an order of remand, same is effectively barred by the U. S. Code. City of Waco vs. U. S. Fidelity & Guaranty Company, 67 Fed. (2) 785, and the cases there cited.

Answering Point Three of Petitioner's Brief

Article 2010 Sec. 5, Rev. Stat. Tex. 1925, which is the same article numbered 1906 and 1265, respectively, of former revisions of Texas statutes, refers only to a plea raising the question of a defect of necessary parties, and has no bearing whatever on an exception to the joinder of an unnecessary party. Commercial Bank of Chicotah vs. First State Bank & Trust Co. of Santa Anna et al. 153 S. W. 1175, 1. c. par. 1, p. 1176. Defect of parties does not mean misjoinder of parties. Faddler vs. Gabbert, 63 S. W. (2) 127, par. 1.

Answering Point Four of Petitioner's Brief

It has been shown that it is not a matter of right that a party defendant may interplead his indemnitor, and when he undertakes to do so, the court may of his own motion refuse to permit same, or the question may be raised by

a motion to dismiss, or even by demurrer, (Frey vs. Ft. Worth & Rio Grande Ry. Co. (Sup. Ct.) 25 S. W. 609, 86 Tex. 465), or by special exception or plea in abatement. (Fidelity Union Casualty Co. vs. Riley, 26 S. W. (2) bottom page 685, top page 686). Petitioner is effectually barred from raising the question on appeal for the following reasons:

a. It did not except to the manner in which the motion to dismiss was raised in the court below.

b. It complains only of the time at which the motion was filed, whereas it was originally filed on June 9, 1932, (Filemark, R. 21) (Prayer for dismissal, R. 23, par. 5 et seq.) which was two days after notice to this respondent was served on his attorneys, (R. 17) and less than thirty days after the bonding company was made a party. (R. 12).

c. The record does not disclose when the transcript from the State Court was filed in the Federal Court, the file mark having been omitted from the record, and, therefore, there is nothing to show at what time the renewed motion in the Federal Court was filed with reference to the time when the transcript was filed there.

d. The motion to dismiss was properly considered by the court, on the record as brought from the State court, and the court could have entered his order of dismissal and remand of his own motion. Wabash Ry. Co. vs. Lindley, 29 Fed. (2) 829.

e. The effort to raise for the first time on appeal the question as to the regularity of the filing of the motion to dismiss the bonding company falls within the inhibitions

of the technicality Act of Congress, and does not affect the substantial rights of petitioner, and the matter will be considered waived for failure to present same in the trial court. (U. S. C., Title 28, Sec. 391; Jud. Code, Sec. 269). Lauderdale Co. vs. Kittel, 229 Fed. 593, par. 3; Monument Pottery Co. vs. Imperial Coal Corp. (C. C. A. N. J.) 21 Fed. (2) 683, certiorari denied 48 Sup. Ct. 213, 276 U. S. 618, 72 L. Ed. 734.

CONCLUSION

The respondent, Curtis Boggs, respectfully shows to the court that he has no controversy save with a citizen of Texas; that he has been delayed now for years; that the ruling of the United States District Court is just, and he urgently requests that same be in all things affirmed.

Respectfully submitted,

G. B. ROGERS,
Attorney for Respondent,
Curtis Boggs.

TOM P. SCOTT,
of Counsel for
said Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 5.—October Term, 1934.

The City of Waco, Texas, Petitioner, *vs.* United States Fidelity & Guaranty Company, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 5, 1934.]

Mr. Justice Roberts delivered the opinion of the Court.

Curtis Boggs, a citizen of Texas, brought suit in a state court against Combs & Glade, contractors, citizens of Texas, and the City of Waco, Texas, for damages asserted to have been caused by collision with a street obstruction. The City by cross-action vouched in the Fidelity Company, respondent, a citizen of Maryland, surety on a bond of Combs & Glade, alleging that company was liable under the bond to pay whatever amount might be adjudged due by the City by reason of the fault of the contractors. The City prayed that if, upon the trial, the plaintiff should recover against it, judgment over should be rendered against the company for a like amount. The company removed the cause to the federal court on the ground that as to it a separable controversy existed.

The plaintiff, after removal, presented a motion in the District Court in which he asserted that no separable controversy existed, since the Fidelity Company was not an original party, but was brought into the case by cross-complaint; that the company was improperly joined under state law and such joinder could not give the federal court jurisdiction; that the cross-action and the removal proceeding were collusively filed to deprive the state court of jurisdiction; that no separable controversy was presented, as the cause of action set up by the cross-complaint could not proceed to trial separately from the main action, but was ancillary thereto, judgment against Combs & Glade being a prerequisite to any judgment against the company. The prayer was "that this entire cause be remanded to the said State Court of the State of Texas, and in the alternative that the suit of this plaintiff against the

defendants Combs and Glade and the City of Waco be remanded to said court, and also in the alternative that the suit as against the United States Fidelity and Guaranty Company by the City of Waco, as evidenced by the cross complaint of the City of Waco, be dismissed and the balance of this action be remanded to the said State Court."

The District Court entered a single decree embodying three separate orders. First, being of the opinion that the record presented a separable controversy between the City and the Fidelity Company, it overruled the motion to remand. Secondly, reciting that the motion to dismiss the cross-complaint had come on to be heard, it found that as to the plaintiff's cause of action the Fidelity Company was an unnecessary and improper party, and granted the motion. Thirdly, since, upon that dismissal, there was no diversity of citizenship of the remaining parties, the court held it lacked jurisdiction, and remanded the cause to the state court.

The City appealed, not from the order of remand, but from that dismissing its action against the Fidelity Company, alleging this was contrary to the law of Texas. The Circuit Court of Appeals dismissed the appeal holding that, as no appeal lies from an order of remand, the cause was irrevocably out of the District Court, the action of that court in dismissing the city's cross-action was moot, and its propriety could not be reviewed. The petitioner complains that this action leaves it in an anomolous position, for, whereas the Circuit Court in its opinion states, "the City by cross action, as permitted by the Texas practice," vouched in the Fidelity Company, the order of dismissal of the cross-action is outstanding, with the result that in the further proceedings in the state court, the District Court's order will be treated as conclusive upon the question of the City's right to maintain its cross-action. Evidently this result was not intended by the Circuit Court of Appeals. In its opinion it says: "all matters concerning the entire controversy, both those presented by the cross bill, and those presented by the main suit are now, because of the remand, pending in the State court and for its action, unaffected by the attempt of the Federal court to dismiss the City's cross action . . .".

The record contradicts this statement. If the District Court's order stands the cross-action will be no part of the case which is remanded to the state court. Indeed, if the District Court

was right, the cause could not have been remanded except for the exclusion of the Fidelity Company as a party. True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

We are of opinion that the petitioner was entitled to have the Circuit Court of Appeals determine whether the dismissal of its cross-action against the Fidelity Company was proper. If the District Court erred on this point, which we do not decide, its action should be reversed. A reversal cannot affect the order of remand, but it will at least, if the dismissal of the petitioner's complaint was erroneous, remit the entire controversy, with the Fidelity Company still a party, to the state court for such further proceedings as may be in accordance with law.

The judgment of the Circuit Court is reversed and the cause remanded to that court with instructions to reinstate the appeal and to proceed therein in conformity with law.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.